Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2013-419619-002 DT 05/26/2016

HON. TERESA SANDERS

CLERK OF THE COURT
S. Radwanski
Deputy

STATE OF ARIZONA

v.

DARNELL MOSES ALVAREZ (002)

MARY-ELLEN WALTER

MICHAEL ZIEMBA
ANNA M UNTERBERGER

CAPITAL CASE MANAGER

UNDER ADVISEMENT RULING

The Court has read and considered *Defendant's Motion to Strike the Death Notice, or Alternatively, Motion to Preclude the Giving of A.R.S. Sections 13-751(E), in part, as a Jury Instruction,* the State's response, and the defendant's reply. The Court has also considered the arguments of counsel.

Defendant argues that A.R.S. §13-751(E) is unconstitutional and as a consequence, the State's Notice of Intent to Seek the Death Penalty should be stricken or alternatively, the jury should not be instructed as to its provisions.

A.R.S. §13-751(E) provides:

> In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency.

Defendant contends that the second sentence of this subsection violates his right to have the jury determine whether death is the appropriate verdict because it provides that the verdict

must be death if the jurors find one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. He believes that this language prevents the jurors from returning a life verdict if they find the mitigation not sufficiently substantial but also believe that the aggravator does not warrant death. Thus, he asserts, the legislature has usurped the jury's role as the trier of facts and thereby violated his Sixth Amendment right to trial by jury.

Defendant's argument is based upon the faulty premise that whether or not death is the appropriate sentence is a finding of fact. The Arizona Supreme Court has held that it is not. In *State ex rel. Thomas v. Granville (Baldwin)*, 211 Ariz. 468, 123 P.3d 662 (2005), the Court addressed the burdens of proof in the penalty phase and the appropriate instructions to be given to the jury to guide its decision regarding the appropriate sentence. The Court held that although the defendant has the burden of proving his proffered mitigating circumstances by a preponderance of the evidence, he does not have the burden of persuading the jury that these circumstances are sufficiently substantial to call for leniency. The Court stated that neither party bears the burden of proving this issue because the statutory scheme does not "indicate that the decision on the appropriate sentence is itself a factual determination." *Id*. at ¶20. The Court further stated:

> We therefore now clarify that the determination whether mitigation is sufficiently substantial to warrant leniency is not a fact question to be decided based on the weight of the evidence, but rather is a sentencing decision to be made by each juror based upon the juror's assessment of the quality and significance of the mitigating evidence that the juror has found to exist.

Id. at ¶21 (emphasis added). *See also*, *State v. Velaquez*, 216 Ariz. 300, ¶41, 166 P.3d 91 (2007) ("*Baldwin* makes clear that the finding of mitigating circumstances is a fact question; it is only the decision whether any mitigating circumstances are sufficiently substantial to warrant leniency that is not a fact question.").

Because the sentencing decision is not a factual determination, A.R.S. §13-751(E) does not usurp the jury's power to decide whether life or death is the appropriate sentence. This statutory provision does not violate the defendant's Sixth Amendment rights. Therefore,

IT IS ORDERED denying Defendant's Motion to Strike the Death Notice, or Alternatively, Motion to Preclude the Giving of A.R.S. Sections 13-751(E), in part, as a Jury Instruction.